UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROGER BARBER, d/b/a	)	**DOCKET NO. CWA-05-2005-0004**
BARBER TRUCKING,	)	
	)	
RESPONDENT	)	

ORDER DENYING COMPLAINANT'S
SECOND MOTION FOR ACCELERATED DECISION

This civil administrative penalty proceeding arises under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. part 22. The U.S. Environmental Protection Agency ("the EPA"), Region V ("Complainant") alleges that Roger Barber d/b/a Barber Trucking ("Respondent") violated Section 405(e) of the CWA, 33 U.S.C. § 1345(e), and 40 C.F.R. part 503, "Standards for the Use or Disposal of Sewage Sludge." Respondent is a *pro se* litigant in this matter.

In an order dated December 7, 2005, I ruled on Complainant's Motion for Accelerated Decision on Liability for Each Violation Alleged in the Complaint ("First Motion for Accelerated Decision"), which was filed pursuant to 40 C.F.R. § 22.20. In that order, I explained that a motion for accelerated decision is akin to a motion for summary judgment, as the party filing the motion (i.e., the "movant") has the burden of showing that no genuine issue of material fact exists. Furthermore, I explained that in considering such a motion, I must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party, and that summary judgement on a matter is inappropriate when contradictory inferences may be drawn from the evidentiary materials. Moreover, I stated that even if a judge believes that summary judgment is technically proper upon review of the evidentiary materials in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial.

Being that the Complainant did not attach supporting documents for its First Motion for Accelerated Decision, this Tribunal's ruling on that motion turned on whether Respondent had admitted liability in his pleadings. I granted accelerated decision in favor of the Complainant on Count I (failure to comply with the vector attraction requirements as mandated by 40 C.F.R. § 503.15(d)) and on the portion of Count II alleging failure to comply with the annual application rate pollution limits. However, I denied accelerated decision as to the portion of Count II alleging failure to develop, and retain for five years, information on the nitrogen requirement for the vegetation grown on the Site during a 365 day period, and I denied

accelerated decision on Count III (failure to develop and maintain a certification statement required by 40 C.F.R. § 503.17(b)(6)), and Count IV (failure to develop and maintain a description of how the vector attraction reduction requirements are met). In an order dated February 16, 2006, I denied Respondent's Motion to Dismiss the latter counts, on the ground that Respondent merely reiterated the language of the dismissal rule without providing any argument as to why this matter should be dismissed.

On March 1, 2006, Complainant filed its Second Motion for Partial Accelerated Decision on Liability ("Second Motion for Accelerated Decision"), which includes a Memorandum, and the "Declaration of Valdis Aistars," who is an environmental engineer in EPA Region V's Water Enforcement and Compliance Assurance Branch (executed March 1, 2006). On March 1, 2006, Complainant mailed its Second Motion for Accelerated Decision to Respondent via Federal Express overnight delivery.

In its Second Motion for Accelerated Decision, Complainant points out that its First Motion for Accelerated Decision was filed prior to the prehearing exchanges. Moreover, Complainant states that its First Motion for Accelerated Decision was akin to a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), because no evidence outside of the pleadings was presented in support of, or in opposition to, the First Motion for Accelerated Decision. Complainant contends that its Second Motion for Accelerated Decision and its supporting memorandum are supported by documents and facts presented via affidavit, including information from the now-complete prehearing exchanges, that constitute "evidence" establishing the violations. Complainant further contends that Respondent's prehearing exchange provides no information and no documents establishing compliance with the applicable requirements, and that Respondent's Answers and the narrative in Respondent's prehearing exchange constitute admissions of failure to comply with the applicable requirements.

Respondent responded to the Second Motion for Accelerated Decision with a document that is captioned as, "Motion Opposing Petitioner's Motion to Reconsider." The certificate of service to the Motion to Reconsider states that it was mailed to the Regional Hearing Clerk, the Complainant, and this Tribunal by regular mail, on March 23, 2006.[1] Respondent states that this Tribunal has already issued its ruling on this matter, and Respondent contends that the reasons stated in Complainant's Second Motion for Accelerated Decision are insufficient to cause this Tribunal to reconsider the ruling that has already been made. On March 28, 2006, Complainant filed its Reply, which states, *inter alia*, that Respondent's Motion to Reconsider had not been filed with the Regional Hearing Clerk as of March 28, 2006, and contends that it was served on Complainant's counsel eleven days after it was due.

[1] This Tribunal received Respondent's Motion Opposing Petitioner's Motion to Reconsider on March 24, 2006. Respondent's Motion was attached to Respondent's Request for Execution of Subpoenas.

Discussion

I observe that the Complainant is re-arguing its previous motion for accelerated decision, albeit this time Complainant is attaching documents in support of its motion rather than solely relying on Respondent's purported admissions in the pleadings. Being that Complainant is re-arguing its previous motion, I regard Complainant's Second Motion for Accelerated Decision as a motion for reconsideration.

First, as a procedural matter, I address Complainant's challenge to the timeliness of Respondent's response to the Second Motion for Accelerated Decision. The Rules of Practice provide that a party's response to any written motion must be "filed" within fifteen (15) days after service of the motion, when such motion is served via overnight or same-day delivery. 40 C.F.R. §§ 22.16(b), 22.7. In computing time, an additional five (5) days is allotted for a response when the motion is served by regular mail. 40 C.F.R. § 22.7. Moreover, if the response period would expire on a weekend or a federal holiday, it is extended to the next business day. *Id.* Service of documents other than a Complaint (such as motions and responses to motions) "is complete upon mailing or when placed in the custody of a reliable commercial delivery service." *Id.* Pursuant to the Rules of Practice, a document is "filed" when received by the Regional Hearing Clerk. 40 C.F.R. § 22.5(a)(1). Furthermore, according to the Rules of Practice, "Any party who fails to respond within the designated [response] period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b).

The Complainant served its Second Motion for Accelerated Decision by overnight mail on March 1, 2006, and therefore Respondent should have filed its opposition by March 16, 2006. Instead, Respondent did not serve its opposition until March 23, 2006, which is beyond the response deadline.[2] Nevertheless, despite Respondent's untimeliness, this Tribunal is not precluded from making a proper ruling on Complainant's motion, especially considering that I have already issued an order ruling on accelerated decision. *See* 40 C.F.R. § 22.4(c) (authority of presiding judge to adjudicate all issues). Moreover, the deviation from the response period is relatively minor, and ignoring the response would work an undue hardship on a *pro se* litigant.[3]

The Rules of Practice do not expressly provide for motions to reconsider an ALJ's orders. In light of my previous ruling on accelerated decision, I focus on purported "new" information and evidentiary materials rather than re-analyzing arguments that were previously made and resolved in my prior ruling. For instance, I previously ruled which statements in Respondent's pleadings were admissions of liability and which were not. Those rulings stand.

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[2] As noted, this Tribunal received Respondent's Motion Opposing Petitioner's Motion to Reconsider on March 24, 2006.

[3] However, the parties are reminded to adhere to all deadlines and procedural rules. A party needing additional time shall file a motion for extension of time, stating the grounds for the requested extension.

The Second Motion for Accelerated Decision points to several documents as support for Complainant's argument that Respondent was liable on the remaining counts at issue on liability. However, the latter documents predate the First Motion for Accelerated Decision,[4] and the Complainant has not made any showing that those documents were unavailable at the time of the First Motion for Accelerated Decision. Moreover, with regards to the Declaration of Mr. Aistars, the Complainant has not made any showing that he was unavailable prior to Complainant's filing to the First Motion for Accelerated Decision. Even if Complainant had made such a showing, the focus of the Declaration appears to be primarily a discussion of the previously mentioned documents and, as noted *supra*, there has been no showing that those documents were unavailable at the time of the First Motion for Accelerated Decision.

Respondent's prehearing exchange was filed subsequent to Complainant's First Motion for Accelerated Decision. I acknowledge Complainant's assertion that Respondent's prehearing exchange does not demonstrate compliance. However, I note that, generally, the Rules of Practice provide that the burdens of presentation and persuasion are on the Complainant. 40 C.F.R. § 22.24(a).

With regards to the purported admission in Respondent's Prehearing Exchange, Respondent states that he is "being accused of intentionally and flagrantly violating various EPA regulations concerning dumping" under 40 C.F.R. part 503. Respondent's Initial Prehearing Exchange (dated Nov. 10, 2005) at 1. Respondent further states that it is alleged that he "was fully aware of those regulations and simply chose not to comply with them." *Id.* at 1-2. Respondent contends that the latter accusations are "absolutely not true." *Id.* at 2. Respondent further states that he is now aware of those regulations, and that he sees that "compliance would have been a simple, very inexpensive matter and it would have been simple to fully comply with all the regulations, and I would have done so." *Id*.

When read in isolation, it would indeed appear that Respondent was conceding liability with his statement in the Prehearing Exchange. However, it is an axiom that in ruling on motions for accelerated decision, reasonable inferences are to be drawn in favor of the non-moving party. When put into context of these proceedings, such an admission would constitute a significant departure from Respondent's previous stance, such as his opposing the First Motion for Accelerated Decision on Liability. Moreover, I note that by filing his opposition to the "Second Motion for Partial Accelerated Decision on Liability," Respondent clearly shows that he does not wish to concede liability. To wit, if Respondent had truly intended to concede liability in the prehearing exchange, there would have been no need for him to oppose the Second Motion (on Liability). Although Respondent's latter filing was untimely, it is nevertheless part of the record before me. Being that Respondent is a *pro se* litigant, ignoring

[4] Documents cited by Complainant in the Second Motion for Accelerated Decision are from the years 2002, 2003, and 2004. The Complainant filed its First Motion for Accelerated Decision on August 25, 2005.

his opposition to the Second Motion for Accelerated Decision would result in a needlessly harsh penalty for his procedural violation.

Additionally, Respondent has produced a certification statement from January 2002. Complainant argues that it does not meet the requirements of 40 C.F.R. § 503.17(b). I find that this raises some question of fact.

Furthermore, I perceive there to be an overlap between at least some of the evidentiary materials Complainant would submit on liability and the evidentiary materials it would submit with regards to the appropriate penalty amount. Accordingly, Complainant will not suffer undue prejudice from denial of its Second Motion.

As scheduled, the evidentiary hearing in this matter commences on April 25, 2006. At this time, I do not find sufficient cause to alter my prior ruling on accelerated decision, which would disturb the status quo on the eve of the evidentiary hearing. Moreover, as noted in my prior order denying accelerated decision, even if the presiding judge believes that summary judgment is technically proper upon review of the evidentiary materials in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. Accordingly, I **DENY** Complainant's "Second Motion for Partial Accelerated Decision on Liability."

Dated: April 12, 2006
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge